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No. 2670

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY (a corporation),
Plaintiff in Error,

vs.

TAGGART ASTON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Filed this.....day of March, 1916

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement.

This cause is before the Court solely upon a single question of law, viz: whether the contract alleged in the first cause of action in the complaint is illegal upon the ground that it is a prohibited contract under the provisions of the Public Utilities Act of California in general, and the orders of the California Railroad Commission affecting the plaintiff-in-error in particular.

The order settling the bill of exceptions certifies

> "that the foregoing bill of exceptions contains all of the evidence in the cause relating to the question presented by the exceptions noted by the defendant, the defendant making no point

> that the evidence is insufficient to sustain the finding that the contract relied upon was entered into and breached as pleaded in the complaint in the first count, but claiming and reserving the point that the contract was illegal and not authorized by the order of the Railroad Commission";

and the bill was settled pursuant to the following stipulation:

> "The foregoing bill of exceptions is correct and it is agreed the same may be settled and allowed in accordance with the certificate thereto attached" (Trans. pp. 90-91).

This view of the record will render it unnecessary for us to do more than to give a bare outline of the facts of the case. The plaintiff in error, a railroad company, was organized on May 4, 1912, and became a public utility corporation as defined by the Public Utilities Act of California. On August 13, 1912, the Railroad Commission of California made its primary order authorizing the issuance of 30,000 shares par value of $3,000,000 preferred stock and 7,500 shares, par value $750,000, of common stock; the preferred stock was to be sold for par with an allowance of 25 per cent for commissions. The projected main line of the road was to run from Red Bluff southerly through the Sacramento valley by way of the town of Dixon, 150 miles or thereabouts to the most convenient junction with the Oakland, Antioch and Eastern Railroad in Solano County; a branch line in Yolo County, about 11 miles in length, was also provided for, making a

total contemplated mileage for the system of about 160 miles. Among other things the order recited:

> "In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be $750,000 paid in on stock before any construction work begins or any expense other than that incident to the sale of stock is incurred by the company, and title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.
>
> In order that the Commission may assure itself at all times that the money received from the sale of this stock is being properly expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts exceeding the amount of $1000."

The formal order itself provided the manner and form in which both the preferred and common stock should be sold and stated that:

> "Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock $750,000".

The order then continued in the following words:

> "The proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of material and rolling stock and the construction of an electric railroad in certain territory, all as set out in

detail in the application and exhibits attached thereto and filed therewith.

"Said company shall keep separate, true, and accurate accounts, showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the Commission in accordance with the Commissioner's general order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And, in addition thereto, said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of $1,000.

"The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the first day of August, 1913.

"The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California" (Trans. pp. 57-66).

Immediately upon its organization, the company set about the preparation of the various details of management necessary to commence to do business. It elected its president and secretary, employed counsel, leased an office in a prominent office building in the city of San Francisco, and em-

ployed a sufficient office force to transact the business of the company (Trans. p. 69).

Operating under the order of August 13, 1912, the company, up to August 31, 1913, had received $416,401.55 on account of the sale of its preferred stock, $212,290 of which was cash and $204,111.55 was represented by promissory notes, and *had paid out* $80,290.20 on account of commissions on the sale of said capital stock, and for expenses in conducting its business, the sum of $40,468.42. It was also shown that *"through the activities of the officers and agents of the company* 90 per cent of the necessary right of way" had been given free to the company (supplemental opinion and order of R. R. Commission, *dated Sept. 27, 1913,* Trans. pp. 67-75). The order just referred to ratified the payment on account of general expenses in said sum of $40,468.42; and the further order was made upon the company, that it should submit, for the approval of the Commission, a detailed statement, *"showing general expenses incurred" from August 31, 1912 (the date of the first order) to September 27, 1913 (the date of the second order)*. The order then continues in the following words and figures:

> "From and after the date of this order, and until the further order of this Commission, said company is authorized to expend for general expenses, similar to those detailed in the statements heretofore made and just above referred to, an amount not to exceed $1,000.00 per month, provided that said $1,000.00 shall not be taken from cash now in the hands of applicant, but shall be realized from promissory notes hereafter taken for the sale of stock.

"Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the Commission in accordance with the Commissioner's General Order No. 24, stating the sale or disposal of such stocks during the preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom *and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof, all contracts for grading, bridging, track, including materials and labor, equipments of all kind and all materials, labor and property involving costs in excess of $1,000.00.*

"The authority hereby given to issue such stock shall apply only to stock issued by said company within the time from the first day of August, 1913, to the first day of August, 1914.

"The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California."

On December 30, 1913, another and second supplemental opinion and order was rendered and made by the Railroad Commission upon the application of the defendant company to allow payments on account of *current expenses* in the sum of $1,250 per month, instead of $1,000 per month for the approval of certain expenses incurred by and on behalf of the company both before and after incorporation, concerning which the opinion says:

"In the supplemental order of September 27, 1913, applicant was ordered to file a detailed statement of unpaid obligations not included in the statement of expenses covering the period up to August 31, 1913. Such detailed statement has now been made, showing a total of $1,647.49, and request is made that the amounts therein contained be allowed to be paid. An examination of these items shows that they are proper items of expense, and therefore should be allowed.

"Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was incorporated. During such activity they expended, on behalf of the project, various sums, totaling $3,159.55, which they now ask this Commission to allow applicant to pay in par of preferred stock.

"It is evident that these men did expend from their own resources the amounts named, and the evidence shows that the board of directors of applicant has allowed these various sums as constituting obligations in favor of these men. Therefore, I think this request should be granted and applicant be authorized to issue preferred stock at par in settlement" (Trans. pp. 83-89).

A short time before the supplemental order of September 27, 1913, was made, the plaintiff in error entered into negotiations with Mr. W. J. Wilsey of Portland, Oregon, looking toward an agreement with him to undertake upon his part the sale of the bonds of the company in Europe. As Mr. Wilsey was leaving for England about October 1, 1913, he desired a preliminary engineering report of an engineer engaging the con-

fidence of both himself and his English clients, upon the project, and hence the employment of Mr. Aston under the terms of the proposition contained in the letter of September 22, 1913 (Trans. pp. 24, 25). This contract was breached by a repudiation of it on the part of the plaintiff in error and notice thereof given to Mr. Aston in a letter from its president, dated October 1, 1913 (Trans. pp. 27, 28). The Court found the contract and its breach as aforesaid, disallowing the last $1,000.00 included in the full contract price of $3,500.00 for the services, because Mr. Wilsey on October 1, 1913, was still on this side and *in natura rerum,* the final payment could not become due since it was conditioned on the company's "hearing from Mr. Wilsey, from London, that the matter is receiving favorable consideration."

Although the findings are not before the Court for review, counsel here, as in the lower Court, strangely contend for some connection between the contemplated contract between the company and Mr. Wilsey for the sale of the bonds in Europe and its contract with Mr. Aston for his engineering services; the claim seeming to be that there was to be but one contract covering one transaction. That there were two contracts to be entered into is put beyond doubt by the telegram of Mr. Donohoe, the president of the company, to Mr. Wilsey, dated September 22, 1913, the date of the company's written acceptance of the Aston contract, as follows:

> "Your proposition acceptable directors desire personal conference prior to execution of formal agreement, have made satisfactory arrangements with Mr. Aston who has commenced on report. When can you be here on way to England" (Trans. p. 54).

Mr. Aston replied by letter to Mr. Donohoe's renunciation of the contract of September 22, and, after saying that he had already made considerable progress upon the report, stated:

> "I shall be glad to convenience you in any way possible that may not injuriously prejudice my position in the matter" (Trans. p. 28).

As a matter of fact on a whole examination of the transcript, it will be shown that, in so far as it was possible to do so without the active co-operation of the company, Mr. Aston fully performed his part of the contract, and the plaintiff in error used his report with Mr. Wilsey in London in order to further their interests there (Trans. pp. 36, 37). Its only excuse for refusing either to keep its agreement with him or recognize an obligation on a *quantum meruit* for services actually rendered has been the illegality of the contract, whether considered as express or implied, because of the lack of previous authorization by the Railroad Commission.

Before opening our argument it will be proper for us to say that, in our opinion, counsel both below and here in their opening brief have begged the question that is before the Court for decision:

that is to say, they have assumed the illegality of the contract between the parties and then they have urged the considerations of law that would render it unenforceable. It will, therefore, not be our purpose to attack their men of straw, but, on the other hand, we will proceed immediately with our attempt to show that the contract alleged in the first count of our complaint is valid in law.

Argument.

Before undertaking to characterize the quality, quantity and the particular effect of the orders of the Railroad Commission of California, in the case at bar upon the contract pleaded in the first count of the complaint, it will be necessary to gain first some idea of the character of the change wrought in the organic law of California by the underlying amendments to the constitution creating the Railroad Commission and providing for the later enactment of the legislature known as the Public Utilities Act. This has been rendered less difficult by reason of the decision of the Supreme Court of California in the case of Pacific Telephone etc. v. Eshleman, 166 Cal. 640.

The elaborate opinion of Mr. Justice Henshaw is a compendium of legal learning and presents a grasp of constitutional principles, and of historical analogies, as well as of present day governmental and economic theories, that is entirely commensurate with the importance and reach of the question

before the Court for decision, viz.: the nature and scope of the governmental authority vested by law in the Railroad Commission of California. To arrive at the ultimate of such inquiry it became necessary for the court to determine, first: the legislative intent of the people of California as expressed in the constitutional amendment creating the Railroad Commission and defining its power; second: the nature and scope of the authority conferred upon the legislature to grant additional powers to the Commission, and third: the construction of the Public Utilities Act, in granting such additional powers. Since all of the foregoing questions were before the Court for decision, and the opinions of the judges contain nothing in the way of *obiter,* we may safely say that the decision in this case lays the bedding stone in the structure which must in the future be raised by the Court in the process of construing and interpreting the legislative-administrative-judicial *pronunciamentos,*—in the form of orders,—of the Railroad Commission. Strange as is the idea to a legal mind trained through an historical contact with the traditions growing out of the development through a thousand years of Anglo-American common law, to commence at the beginning it is necessary to realize that in the organization of the Railroad Commission the people of the State of California have conferred plenary legislative, administrative and judicial power upon a board composed of five members.

The grant of powers to the Railroad Commission by section 22 of article XII of the constitution provides as follows:

> "Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.
>
> *"No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commision additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution."*

By an amendment adopted at the same time section 23, article XII of the constitution was amended to confer upon the Railroad Commission power and jurisdiction to regulate and control all public utilities. After enumerating the enterprises, including railroads, which were declared to be public utilities, it was provided that all should be

> "subject to such control and regulation by the railroad commission as may be provided by the legislature," * * *
>
> *"The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution."*

Pursuant to the grants of power above set forth, the legislature of California passed the Public Utilities Act, which particularly provides for the organization of the Commission, the grant of large powers over all public utilities, heavy penalties in the way of fines upon public utilities violating orders of the Commission, the power to punish for contempt. It also contains the following legislative declaration:

> "If any section, sub-section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that

> it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, clauses or phrases be declared unconstitutional."

The provisions of the Public Utilities Act which are pertinent and necessary to the construction and interpretation of the orders of the Railroad Commission in the case at bar will be found in section 52. The title of the section is given as follows:

> "Approval of Stocks and Stock Certificates and Bonds, Notes and Other Evidences of Indebtedness".

Subdivision (a) of section 52 contains the declaration that the power to issue the foregoing "is a special privilege", to be exercised as provided by law and under such rules and regulations as the Commission may prescribe". Subdivision (b) provides for the method by which the securities of the public utility may be issued, the hearing before and the investigation by the Commission in regard thereto, and, particularly, that

> "No public utility shall, without the consent of the Commission, apply the issue of any stock or stock certificate, or bond, note, or other evidence of indebtedness, or any part thereof, or any proceeds thereof, to any purpose not specified in the commission's orders, or to any purpose specified in the Commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favored than those specified in such order or a modification thereof."

Subdivision (f) provides, among other things, that one.

> "who, directly or indirectly, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificates, or bond, note, or other evidence of indebtedness to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, * * * shall be guilty of a felony."

Within the foregoing excerpts taken from the various organic acts which go together to create and define the power of the Railroad Commission of California is to be found those elements of unlimited governmental control which have never heretofore in the history of England or America been lodged in any one department of government, except the English Parliament; and which, as has been justly said, make the enactments, if not anomalous, certainly *sui generis,* in the broadest possible conception of that term.

The scope and effect of the constitutional amendments as defined by the Supreme Court of California show the intent not only to grant unlimited legislative, administrative and judicial power to the Railroad Commission, as an organization of five members, but also the deliberate purpose to withdraw from the Courts of the State practically all jurisdiction to review the orders of the Commission, thereby establishing for such orders the legislative-judicial effect of special legislation and star-

chamber decrees combined: a purpose so clearly foreign to the ideas of Anglo-American jurisprudence as to justify the belief, if it were not otherwise patent upon the face of this legislation, that it was conceived by minds as wholly unfamiliar with English constitutional history as with the history of English law. Whatever may have been the foreign and alien influences, steeped in considerations of absolutism, that produced this hybrid legal "sport", we still will hazard the hope that there remains, as a part of the processes of the Common Law, sufficient juices representative of the spirit of liberalism and personal freedom to dissolve and digest the outer shell of the Railroad Commission law of California, and release its kernel with all its proper nutritive effects upon the body politic.

The power and authority which the legislature of California has granted to the Railroad Commission over public utilities is the same unlimited power granted to the legislature under the constitutional amendments, to confer such "additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution." This is effected, in part at least, by the provision in section 67 of the Public Utilities Act limiting the right of review by the Supreme Court of the orders of the Railroad Commission, and providing that it

> "shall extend no further than to determine whether the commission has regularly pursued its authority, including the determination of

> whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California."

It is also provided by the same section that

> "The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

By the construction which has been given to the amendments creating the Railroad Commission and defining its power, and granting the legislative authority to confer upon it

> "additional powers of the same kind or different,"

it has been held that the orders of the Railroad Commission, when acting within the scope of power thus conferred by the legislature, are limited only by the Constitution of the United States.

This is the conclusion definitely reached by the Supreme Court of California in the case of Pacific Telephone etc. Co. v. Eshleman upon the meaning and effect of the organic enactments which are set forth above. The Court said:

> "Two constructions of the constitutional provisions above quoted have been presented to the consideration of the court. First, that the constitution itself has designedly conferred upon the legislature the fullest possible powers to legislate concerning public utilities through the board of railroad commissioners; that it was intended that upon the board of railroad

commissioners should be conferred whatsoever powers the legislature saw fit, and that nothing in any other provisions of the constitution should hamper the legislature in so doing; that the board of railroad commissioners itself was especially exempt from the operation of the recall, to the end that it might exercise such powers as the legislature might confer upon it without possible embarassment; that the railroad commission differs from all other officers of the state in that the legislature alone, and not the people, is authorized to unseat any of its members (const. art. XII, sec. 22); that this constitutional meaning is precisely and aptly evidenced by section 22, when it declares that 'No provision of this constitution shall be construed as a *limitation upon the authority of the legislature* to confer upon the railroad commission *additional powers* of the same kind *or different* from those conferred herein which are not inconsistent with the powers conferred'; that there is the fullest possible grant of authority, to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the legislature in the commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the legislature may not curtail any of the powers vested by the constitution in the railroad commission, but that the legislative authority, to confer any kind of additional powers is, and is expressly declared to be, 'plenary and unlimited by any provision of this constitution'; further, that the people in enacting these constitutional amendments designedly and deliberately did this thing, to the end that the railroad commission thus constituted should have its labors unvexed and their results untrammeled by the courts of the state; that the legislature itself adopted this view of the Public Utilities Act, which was framed with much care

and passed with due deliberation; that this is shown in many passages of the act itself, not alone in that which deprives the superior courts of their constitutional jurisdiction, but as well in that which deprives this court of a jurisdiction which otherwise it would have. For it has universally been held by all courts, and specifically by the Supreme Court of the United States, in reviewing the orders of the interstate commerce commission—a kindred board to our railroad commission—that the question of discrimination and reasonableness is always subject to judicial review. (Interstate Commerce Commission v. Northern Pac. R. R. Co., 222 U. S. 541, (56 L. Ed. 308, 32 Sup. Ct. Rep. 108).) Our Public Utilities Act in terms declares that the determination of the commission shall not be open to review upon the subject of 'reasonableness and discrimination.' When the legislature vested in this court alone this limited power of review and included therein the duty by this court to determine whether a petitioner's constitutional rights were violated, it meant, so far as the constitution of the state is concerned, only those constitutional rights of which the petitioner had not been deprived by legislative enactment. While, so far as the constitution of the United States is concerned, it being a law paramount in dignity and force even to the state constitution, the state, not having the power to deny a petitioner the protection of the constitution of the United States, simply made recognition of that fact.

"This view is certainly borne out by the language of the constitution itself, by the action of the legislature under it, and by the position taken by Mr. Thelen, a member of and representing the railroad commission, at the oral argument. The grant of power to the legislature being that it may confer upon the railroad commission any additional power that it sees fit, the limitation upon this grant being merely

that the powers shall not be inconsistent with those conferred by the constitution itself, the declaration of the constitution being that the legislature's power is plenary and unlimited, it necessarily and conclusively follows that the legislature may confer upon the railroad commission in the matter of the management and control of public utilities, in making of its orders and decrees, in the punishment for the violation of its orders and decrees (all of which subject matters are cognate and germane to and not inconsistent with the constitutional powers conferred) whatsoever authority it may see fit, and that that authority may be exercised without the slightest restraint; every constitutional protection and guaranty, civil and criminal, which the constitution has accorded to all other kinds of property and the owners thereof, are or may be denied to this class of property and its owners. * * *

"The second construction of these constitutional provisions is one which would limit the power which the constitution authorized the legislature to confer upon the railroad commission strictly to the matter of 'supervising and regulating' public utilities. Thus all 'additional and different' powers which the legislature is authorized to confer upon the commission must be powers within this defined and circumscribed limit. The learned attorney for the railroad commission in his printed brief recedes from the position which he took upon oral argument, and contends for this latter construction, basing his contention upon 'further study of the section and conference with some of the men who drew the section and who were instrumental in having it submitted to the legislature and having it adopted by the people of the state.' But this court in construing a constitutional enactment is limited to the language of the enactment itself. In this instance, as in all others, we may not be gov-

erned by what the framers of the amendment meant to say. We are of necessity controlled by what they did say. But, so far as respondent is concerned, the concession yields too much, for, under the first view, the legislature, acting in the matter without any constitutional restraint, was perfectly justified in conferring any powers that it saw fit upon the railroad commission. It could have declared that its decisions were not reviewable by any court of the state, and, of course, having that power, it could limit the scope of review to any particular court, and, still further, limit the hearing before that court. This is precisely what the legislature has done under the sanction of the constitution as first construed. If, however, the view last advanced by the railroad commission is to prevail and the legislative power is pent up and confined by matters of regulation only, then it necessarily follows that its clearly expressed attempt to deprive the superior court of all jurisdiction, its clearly expressed attempt to limit and circumscribe the jurisdiction of this court in some particulars, its further attempt to enlarge the scope of the writ of review, its declared intent to deprive all the courts of the state of the power to say whether a specific order of the commission is reasonable or discriminatory, are one and all violative of state constitutional provisions. More important still, many of the powers expressly conferred upon the commission by sections 40 and 41, giving to the railroad commission the unrestricted right based upon public convenience and necessity, to compel a physical surrender of the properties of one public utility for use by another, upon 'a reasonable compensation and reasonable terms and conditions for the joint use' fixed by the railroad commission itself, themselves do violence to article I section 14 of the state constitution, which forbids such a taking or injury without compensation fixed

by a jury, first made and paid. For the taking of property devoted to a public use from the control of the owners, even though in so doing it be devoted to another public use, is a taking of property within the meaning of the constitution. (Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226 (41 L. Ed. 979, 17 Sup. Ct. Rep. 581).)

"In view of these considerations we regard the conclusion as irresistible that the constitution of this state has in unmistakable language created a commission having control of the public utilities of the state, and has authorized the legislature to confer upon that commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the constitution to all other kinds of property and its owners. And while, under our republican form of government (a form of government under which the three departments — administrative, executive and judicial — have in the past one and all been controlled by the limitations of a written constitution (In re Duncan, 139 U. S. 449, (35 L. Ed. 219, 11 Supt. Ct. Rep. 573)), it is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions; nevertheless this is but a reversion to the English form of government which makes an act of parliament the supreme law of the land. It was at one time argued as to such acts of parliament that while not otherwise invalid they would be decreed invalid if 'contrary to natural justice or to natural right.' But as this determination itself involved a resort to the courts and thus made the decision of the courts to that extent superior to the law of parliament, the present day jurisconsults are agreed that an act of parliament is not controlled by natural right or justice, but is controlled solely by what is deemed to be expedient and wise to the law-making power itself. (Bryce's Ameri-

> can Commonwealth, chap. 23.) So, here, the State of California has decreed that in all matters touching public utilities the voice of the legislature shall be the supreme law of the land."

The orders of the Railroad Commission, then, must be treated as paramount and supreme legislative enactments, of the same dignity as an Act of Parliament; and the courts of the land, state and federal, despite the habits of mind of its judges to apply fundamental checks upon arbitrary, unreasonable, or unconstitutional exercise of governmental power, must limit the exercise of their judicial functions solely to what is allowed by the sound canons of legal interpretation. We must look then to English precedents alone to determine to what extent a court may go to control the meaning and the effect to be given to a statute or an order of an administrative body in such a case. The allusion which Justice Henshaw makes to the present day agreement of jurisconsults that an Act of Parliament is not to be controlled by the ideas of the Court as to what constitutes natural right and justice, but "is controlled by what is deemed to be expedient and wise to the law making power itself", comes to us from Justice Willes in expressions used by him in the decision of Lee v. Bude and Torrington Junction Rail Co., L. R. 6 C. P. 576, at 582. He said:

> "It was once said,—I think in Hobart (in Day v. Savage, Hob. 87, 'Even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in

> itself; for *jura naturae sunt immutabilia,* and they are *leges legum*')—that, if an Act of Parliament was to create a man judge in his own case, the Court might disregard it. That *dictum,* however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

This, by no manner of means, prevents courts from determining what particular effect shall be given to Acts of Parliament in order to give force to the legislative intent; and we find that many sound canons of legal interpretation have been brought into being for the purpose of aiding courts to arrive at that intention. The Golden Rule of statutory construction is a primary one, and has been stated as follows:

> "The grammatical and ordinary sense of the words is to be adhered to, unless it would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further."

Justice Burton, in Warburton v. Loveland, 1 Hudson & B Irish Cases, 623, at p. 648, states the rule as follows:

> "I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such inconvenience, but no farther."

See also the same point:

Perry v. Skinner, 2 M. & W. 471, at p. 476;

Abley v. Dale, 11 C. B. 378, at p. 391;

Waugh v. Middleton, 8 Ex. 352, at p. 357.

The following is also pertinent:

> "The meaning of particular words in an Act of Parliament to use the words of Abbott, C. J. in Rex. v. Hall (1822), 1 B. & C. 123, at p. 136), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.' "—The Lion (1869), L. R. 2 P. C. 525, at p. 530; 38 L. J. Ad. 51, at p. 54, Lord Romilly, M. R., delivering the judgment of the Judicial Committee.
>
> "There is always some presumption in favour of the more simple and literal interpretation of the words of a statute, or other written instrument.
>
> "The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other

> construction by which that intention will be better effectuated." Caledonian Rail. Co. v. North British Rail Co. (1881), 6 App. Cas. 114, at pp. 121, 122, Lord Selborne, L. C. (cited and followed by Jessel, M. R., in Ex parte Walton (1881), 17 Ch. D. 746 at pp. 750, 751; 50 L. J. Ch. 657, at p. 659; and by Chitty, J., in Spencer v. Metropolitan Board of Works (1882), 22 Ch. D. 142, at pp. 148, 149."

An important rule of construction is one that operates to restrict general language in a statute and has been stated as follows, by Lord Herschell in the case of Cox v. Hakes, 15 App. Cas. 506, at p. 529:

> "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to apply without some limitation."

See also the expression of the Lord Chancellor (Halsbury) upon the same point, Id. at p. 518, and of Lord Esher, M. R., in re Brockelbank, 23 Q. B. D. 461, at pp. 462, 463.

Courts will apply the same rule of liberal construction in order to prevent injustice. Where the language of a statute is doubtful or obscure, it may, if susceptible of it, be modified or varied in order to avoid a manifest injustice.

As said by Brett, M. R., in The Queen v. Overseers of Towbridge, 13 Q. B. D. 339 at p. 342:

> "If an enactment is such that by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice."

See also

Hill v. East and West India Dock Co., 9 App. Cas. 448, at p. 456;

Railton v. Wood, 15 App. Cas. 363, at p. 367.

We also find this language of Lord Escher, in Gowan v. Wright, 18 Q. B. D. 201, at p. 204, to be very interesting with reference to the case at bar:

> "Is there, then, any general rule of construction applicable to such a proviso which enables us to limit the meaning of the words so as to prevent the defendant from doing what he seeks to do? I find in Maxwell on the Interpretation of Statutes, 1st ed. 1875, p. 184, in a section headed 'Construction against impairing obligations, or permitting advantages from one's own wrong; the principle resulting from the various authorities there collected expressed as follows: on the general principle of avoiding injustice and absurdity, any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act, or otherwise profit by his own wrong."

We cite these cases from the English Courts not because the rules there laid down are different in degree or effect from those recognized by our own Courts, but because we are called upon to interpret a legislative enactment or administrative order

having the force and effect of a special Act of Parliament; and it is prudent, if not useful, to seek the protection of the precedents of courts which have never considered that they could exercise any constitutional power in the control of the scope and effect to be given to the legislative intent.

The same rules of statutory construction have been given effect to by the Supreme Court of the United States.

In Henderson v. Mayor of New York, 92 U. S. 259, at p. 268, it was said:

> "In whatever language a statute may be framed, its purpose must be determined from its natural and reasonable effect."

In Yick Wo v. Hopkins, 118 U. S. 356, at p. 373, the same Court speaks of the construed effect that it was forced to give to the city ordinance before it, and of the reasoning by which its meaning was arrived at, as "deductions from the face of the ordinance as to its necessary tendency and ultimate actual operation."

In United States v. Kirby, 7 Wall. 482, at p. 486, the Court lays down the general rule which we contend for, as follows:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over the letter."

See also

Lau Ow Bew v. U. S., 144 U. S. 47;

Church of Holy Trinity v. U. S., 143 U. S 457;

Oates v. First National Bk., 100 U. S. 239;

United States v. Mooney, 116 U. S. 104.

The same court has also held that

"The operation of a statute may be restrained within narrower limits than its words import, when it is evident that the literal meaning of its language would extend it to cases which the legislature never designed to embrace in it."

Brewer v. Blougher, 14 Pet. 178;

Petri v. Commercial Nat. Bk., 142 U. S. 644, at p. 650;

McKee v. United States, 164 U. S. 287.

One other rule of construction is important to be considered in the case at bar. It is a rule established in numerous cases by the Supreme Court of the United States that

"Practical construction of ambiguous statutes by governmental departments controls."

United States v. Graham, 110 U. S. 219;

United States v. Alabama, G. S. R. Co., 142 U. S. 615;

St. Paul M. & M. R. Co. v. Phelps, 137 U. S. 528.

In construing doubtful phrases in a statute, the courts will adopt the legislature's interpretation of

its own language, afforded by a subsequent statute on the same subject.

> Alexander v. Alexandria, 5 Cranch. 1;
> Tiger v. Western Invest. Co., 221 U. S. 286.

As to the force of executive construction of a statute, see U. S. v. Cerecedo Hermanos y Co., 209 U. S. 338.

Applying these rules to the construction of the orders of the Railroad Commission of California effective at the time plaintiff entered into the alleged contract with the defendant company on September 22, 1913, and which became effective September 27 and December 30, 1913, we urge that no limitation whatever existed upon the power of the defendant, or was thought to exist by the Railroad Commission, to enter into such a contract for engineering services. That the order of August 13, 1912, is ambiguous, will not be denied by the defendant company. It contains a specific prohibition that

> "Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock $750,000."

Standing alone it is questionable even whether this provision would cut off the power of the company to contract for the character of services to be performed upon its behalf by the plaintiff, services necessary to be performed in advance of any substantial construction of the company's railroad

project. This Court will recognize that railroad systems of the size contemplated by the defendant's charter are built for the most part out of the proceeds of the sales of first mortgage bonds, to the promotion of the *issue and sale* of which *prior to construction,* services of the nature furnished by plaintiff are clearly requisite. Plainly, therefore, the prohibition in the order against the creation of liability and the paying out of money "except for commissions" refers *solely to construction contracts.*

It is to be always remembered that Mr. Aston's engineering services were employed by the plaintiff in error to aid in assisting the company to take its initial steps to obtain a preliminary offer in the bond markets of the world, which having been received would have become the subject of a contract that would necessarily have to be approved by the Railroad Commission. Certainly it cannot be the intention of counsel for the railroad company to lay itself open to the charge of unsophistication to a degree that would impute to them an ignorance of the necessity for secrecy concerning all the movements of its financial agents at this early period in its organization. The form taken by the concluding provision in the order of August 13, 1912, to the effect that,

> "in addition thereto, said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, includ-

> ing materials and labor and property involving costs in excess of $1,000,"

must be credited to the Railroad Commission as having in mind the fact that there are some matters concerning which it cannot, as a matter of practical effect, tie the hands of newly organized railroad companies. Upon more general principles it could not be urged that the company's *power to contract* was cut off by the limitation first mentioned; for by the latter limitation, *it may contract for construction work up to the amount of $1000 without the consent of the Commission.* The latter provision applies, then, to the particular kind of contracts enumerated, and we have a plain case for the application of the maxim, *expressio unius, exclusio alterius.*

Again, the power to contract and disburse moneys for other purposes than the payment of commissions on the sale of stock is to be implied from that part of the order requiring that

> "said company shall keep separate, true and accurate accounts, showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the commission in accordance with the Commissioner's general order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom, *and the use or application of such money or property:*"

the latter a wholly useless provision if the company

could not lawfully pay out other money than on account of commissions for the sale of its stock.

Again, it will not lie in the mouth of the defendant company to claim that the requirement of the order that

> "The proceeds from the sale of said preferred stock shall be used for the following purposes (and no other): For the purchase of material and rolling stock and the construction of an electric railroad in certain territory, all as set out in detail in the application and exhibits attached thereto and filed therewith" (the foregoing brackets are ours),

was meant to postpone the company in the expenditure of its funds until it could enter upon the construction state of its contemplated operations, and it was not so construed either by the company for the recital in the supplemental opinion and order of September 27, 1913, is to the effect that it appears that "through the activities of the officers and agents of the company 90 per cent of the necessary right of way over which this line of railroad is to be constructed has been given free to the company". Obviously it was employing right of way agents as well as stock selling agents. Here is an instance where the meaning of general terms must be restricted to give operation to exceptions which are as imperative as they are commonplace and natural.

So far we have dealt only with those intrinsic features of the orders of August 13, 1912, and of September 27, 1913, which conclusively, we think, negative the idea that the defendant company was

under an express prohibition to enter into the contract with the plaintiff herein. What shall be said then of the fact that by the construction placed upon the terms of the first order by the defendant company and by the Railroad Commission in its supplemental order of September 27, 1913, when under it the one incurred obligations in excess of $40,000.00 and the other ratified the action of the former in so doing? We venture to say that the defendant company will have nothing that is sound, either in law or ethics, to oppose the proposition that this contemporaneous interpretation of these orders by both the company and Railroad Commission is conclusive and controlling as to the validity of the contract sued upon.

We have thus far discussed the internal evidences, contained in the order of August 13, 1912, to show that there could be no general intent on the part of the Commission to limit the power of the company to enter into so essential a contract as the one in question here. The external evidence presented by the conduct of both the company and the Commission more strongly sustains our contention. The company in the course of incurring $40,000.00 and upwards of expenses, in addition to its obligations on account of commissions, confronted this same question as to the real meaning of the limitations contained in the order of August 13, 1912, and when in doubt it would have "*an informal consultation* with Commissioner Edgerton", and "ascertain his views". The Court very pointedly called atten-

tion to the fact that such a proceeding could not result in securing an authorization from the Railroad Commission itself (Trans. p. 77); and it is very obvious, of course, that Mr. Commissioner Edgerton should not be charged by the plaintiff in error here with knowingly violating the Public Utilities Act and the orders of the Railroad Commission itself, but that his action consisted in aiding to give merely an *interpretation thereof.* That this was the view taken by the company appears from the testimony of its counsel, Mr. A. C. Huston, at page 75 of the Record, where he says:

> "My first impression and construction of that order (August 13, 1912) was that so far as current expenses were incurred, we had the implied right to it.
>
> "THE COURT. I think your construction was correct."

The Railroad Commision as a body has also confirmed the construction of the order of August 13, 1912, that we contend for. First, by ratifying the $40,000.00 and upwards of expenses and obligations incurred between August 13, 1912, and the date of the first supplementary order, to-wit, September 27, 1913; Second, by its second supplementary order, dated December 30, 1913, authorizing the payment of certain detailed expenses totaling $1,647.49 in one case and $3,159.55 in another. *The latter was ordered paid by an issue of preferred stock to that amount at par.* This claim is in an amount comparable to that sued for here, and we respectfully urge that we are not entitled to any less consideration

than other creditors of the company have received whether our contract is considered to have been illegal because prohibited by, or valid under a proper interpretation of, the Commission's order.

It has always seemed incredible to us that the defendant should attempt to escape liability on the ground of the alleged illegality of this contract with the foregoing dilemma confronting it, for such a contention presents to the Court a request to construe the order of August 13, 1912, so as to imply a power on the part of the Railroad Commission that would be squarely in the teeth of the prohibition in the Fourteenth Amendment of the Constitution of the United States against denying the defendant in error in this jurisdiction "the equal protection of the laws". It is not requisite that the law, ordinance, or order should bear upon its face the manifest intention that it should operate unjustly, arbitrarily or oppressively in order to bring it within the condemnation of the law; *it is sufficient if, in its execution, such is its necessary tendency and ultimate actual operation.*

The limit of arbitrary governmental action, it is to be hoped, was set for all time in this country by Mr. Justice Matthews in the decision of the Supreme Court of the United States in Yick Wo v. Hopkins, 118 U. S. 356. We cannot forbear to include two passages from so notable a source; the one showing the spirit of our institutions with which the plan and methods of the Railroad Commission of California, as urged by the defendant

herein, are so greatly at odds; the other stating the considerations which make it impossible for such a method to be held lawful. Among other things, Mr. Justice Matthews said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of

another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * *

The same principle has been more freely extended to the quasi legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonablenesss and consequent validity of their by-laws. In respect to these, it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property."

After citing the case of Baltimore v. Radecke, 49 Md. 217, holding invalid an ordinance committing to the unrestrained will of a single public officer the power to notify every person owning a stationary steam engine in Baltimore to stop using it as a reasonable police regulation, the learned judge continues:

"This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances

as adopted, *they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment of the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this court in Henderson v. Mayor, etc. of New York, 92 U. S. 259 (Bk. 23 L. ed. 543); Chy Luny v. Freeman, 92 U. S. 275 (Bk. 23, L. ed. 550); Ex parte Va. 100 U. S. 339 (Bk. 25, L. ed. 676); Neal v. Delaware, 103 U. S. 370 (Bk. 26, L. ed. 267), and Soon Hing v. Crowley (supra)" (italics are ours).

Finally, it is worthy to note that we may claim the protection of the "equal protection" clause of the 14th Amendment on behalf of the plaintiff herein, a British subject, under the authority of this case.

THE CONTRACT NOT NECESSARILY VOID EVEN IF PROHIBITED BY THE PUBLIC UTILITIES ACT.

The legislature by sec. 52 of the Public Utilities Act has provided that, *without the consent of the Railroad Commission,* no public utility shall apply

the issue of stocks etc., or any proceeds thereof, to any purpose not specified in the Commission's order. It is perfectly clear that with the Commission's consent, express or implied, the issue of stock or the proceeds thereof may be applied to any purpose, whether specified or not by the Commission in its order. The absolute power vested by the constitution and laws of California in the Railroad Commission is not compatible with any other view of the situation. The Commission has plenary and unlimited power to supervise and regulate, among others, the railroad business of California; clearly, therefore, the penal clause of sec. 52 becomes effective only as and when it is called into action by the exercise of the discretion of the members of the Commission. It is one of the remarkable features of the Railroad Commission law of California that its power of special legislation, under the constitution of the state, extends to making criminal acts of parties under a special order in one case what may not be made criminal under a special order in an exactly similar case. Such is undoubtedly the law, however, and the only reason it may not by its special order create an *ex post facto* law is the happy circumstance that, as a state agency exercising legislative power, it is necessarily limited in that regard by the constitution of the United States. Therefore before it can be said that a certain contract between a public utility corporation and a third party is void by reason of being within the express

prohibition, or subject to the penal provisions, of a special order of the Commission, it is necessary to know what its intent was in those regards. In either case if the intent is not to penalize the act of the public utility company out of which the contract with the third party arises, or if it has consented to the contract expressly or by implication, the contract is not void for illegality. This rule, by analogy, must be carried over from cases arising with reference to contracts alleged to be in violation of legislative enactments, to contracts alleged to be in violation of the special orders of the Railroad Commission. Anomalous as is the condition that confronts us, we do not have to explore any unknown regions of the law, but may, with the utmost confidence, rely upon an unbroken line of common law precedents to vindicate the position for which we respectfully contend.

The law clearly is that not every prohibited contract is void or unenforceable. The unenforceability of illegal contracts depends almost if not entirely upon the application of the maxim *in pari delicto, conditio defendentis portior est.* It may be safely admitted that where a statute prescribes a penalty for an act, a contract involving the commission of the act is void even though the statute does not prohibit the contract or pronounce it void. In such cases the parties to the contract are always *in pari delicto.* As said in Swan v. Swan, 11 Serg. & R., 163:

> "The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant."

But not every prohibited transaction is illegal and there is no presumption that a prohibited act is illegal; and this is true where the prohibited act may constitute a public offense. This rule was laid down in the interesting case of Lewis v. Bright, 4 E. & B. 917; 24 L. J. Q. B., 191. The case arose upon the breach of an agreement to exchange livings wherein the incumbents had mutually promised not to call upon the other to pay for dilapidations. The plaintiff sued the defendant as for breach of his common law duty to keep the rectory he had received from the defendant in repair. The defendant pleaded the agreement above stated and there was a verdict in his favor. The plaintiff then moved for a verdict *non obstante* upon the ground that such an agreement for the exchange of benefices was simonical under the statute of 31 Eliz., c. 6, which made it an offense to corruptly resign or exchange benefices. The Court held that

> "if consistently with the plea a given state of things *can be imagined* free from the taint of simony, then the motion will not succeed."

And after assuming various states or conditions of things in the particular case that would characterize a legal transaction, the court concluded:

> "There is no benefit derived there by the arrangement, nor any improper benefit derived from the exchange of livings. Such a contract would not be corrupt, and it is perfectly consistent with the plea that such was the real state of things: if so we cannot make the rule absolute."

Still asserting the position we have taken that no order of the Railroad Commission in force at the time of the transactions here involved contained, expressly or by implication, any inhibition upon the defendant company's entering in this contract, still the rule is that such a contract so entered into would not necessarily be void. It would not be void if it could be shown to be the intent of the Railroad Commission that it should not be so held; and it would not be so held if, taking all the facts into consideration, the order together with the penal provision of the Public Utilities Act limits the effect or declares the consequences which shall attach to the making of the contract, otherwise than by declaring it void. In other words while a contract involving the performance of an act expressly prohibited is void and the parties seeking its enforcement are necessarily *in pari delicto,* still a prohibition may be so declared that its object and purpose falls short of that of declaring a contract, made in derogation of it, void. Declaring what specific effects are to follow the violation of the public policy established by the statute is equivalent to excluding the idea of a more general

effect rendering all contracts affected by the wrongful act of the parties, void.

This rule is well stated in Dunlop v. Mercer, 156 Fed. 545, at 555:

> "A general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the court to do so, and they will not thus affix an additional penalty not directed by the law making power."

Also as said in Harris v. Runnels, 12 How. 84-85, 13 Law. ed. 901:

> "Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its unconditional application to every case is denied. It is true that the statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to void a contract made in contravention of it. *When the statute is silent, and contains nothing* FROM WHICH THE

CONTRARY COULD BE INFERRED, a contract in contravention of it is void" (the italics are ours).

The last sentence above shows how narrow the rule is which declares a contract void as being in violation of the terms of an express statutory prohibition, or the terms of a penal statute. Only in those cases where no inference of a contrary legislative intent may be drawn, are such contracts to be held to be void. The rule for determining the legislative intent in such cases is given in Dunlop v. Mercer, supra, at p. 556, as follows:

> "The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy and the effects of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void, and, if from all the considerations it is manifest that the legislature had no such intention, the contracts should be sustained; otherwise, they should be held void."

Other cases to the same point are:

Chattanooga R. Co. v. Evans, 66 Fed. 809-15;

Hanover Nat'l Bank v. First Nat'l Bank, 109 Fed. 421-26;

Blodgett v. Lanyon Zinc Co., 120 Fed. 893-96-97;

Gold Min. Co. v. Nat'l Bank, 96 U. S. 640;

Fritts v. Palmer, 132 U. S. 282-89-93;

Rutkowsky v. Bozza, 77 N. J. L. 724; 73 Atl. 502;

Pangborn v. Westlake, 36 Iowa 546;
Philadelphia Loan Co. v. Tower, 13 Conn. 249;
Roosman v. McFarland, 9 Ohio St. 369.

What we have said by way of construing the orders of the Railroad Commission, which here stand in the place of legislative enactments, as not inhibiting the contract here sued upon, may be equally applied to an argument which would go to negative the idea that the Commission intended either that the penalty of sec. 52, subdivision (f) of the Public Utilities Act should apply to the defendant railroad company in case of the violation of the terms of its order of August 13, 1912, on the one hand, or to declare void, as against parties not *in pari delicto,* contracts made in contravention to the terms thereof.

When we come to put into practice the test of determining what the scope and meaning of section 52 of the Public Utilities Act is we certainly are led to the irresistible conclusion that the legislative intent is expressed in terms sufficiently broad to confer upon the Railroad Commission the power to penalize, if not to render void, the contract of a public utility corporation to buy a typewriter ribbon, but, unless the contention of the learned counsel for the defendant is to prevail here, the penal character of this section is not, *ex necessitate,* carried into every special law enacted by the Railroad Commission in the form of one of its orders; but even if the penalty in the Public Utilities Act,

ex proprio vigore, follows the order of the Railroad Commission, nevertheless the penalty thereby provided is by its terms exclusive, and is directed to the corporations and its agents, and third parties dealing with the corporation are, therefore, not *in pari delicto.* Also the form of the penalty negatives the idea that it was the legislative intent to declare void contracts made in contravention of the Commission's orders. We do not have to speculate whether or not under the unlimited authority intended to be conferred on the Railroad Commission, it would have original power to declare in and by its orders that all contracts in contravention of the terms thereof, should be void. It is sufficient for all the purposes of this case that none of the analogies for declaring contracts void as against public policy where the parties are *in pari delicto,* obtain here. Neither the Public Utilities Act nor any order of the Railroad Commission declares that the contract between the plaintiff and defendant herein shall be void: from neither of these sources may any logical inference be drawn that it was the purpose of either the legislature or the Commission to destroy such a contract or prohibit its performance; but that, on the contrary, there is evidence of a most convincing nature that it was the purpose and intent of the Commission to leave the defendant corporation free to enter into this contract and many other kindred contracts.

It has been impossible for us to deal specifically with all the points raised in the brief filed by coun-

sel for the plaintiff in error. Our point of view is so widely different from theirs, that it has seemed necessary to present our theory of the law and the facts and depend upon the rule of exclusion to operate in our behalf. If your theory of the case is correct, theirs must be wrong; if ours is wrong theirs is right.

Counsel in the closing pages of their brief range far afield in search of expediential argument in behalf of sustaining their view of the wide scope to be given the powers of the Railroad Commission under the provisions of the Public Utilities Act. They refer to instances where they say the exercise of its summary jurisdiction has had a most beneficent influence. We are the last people in the world who would contend that the power of the Commission is limited. We admit it is plenary to a degree heretofore unknown to English law. We have no personal knowledge, and the record does not inform us concerning the action of the Commission in the case of the Solano Irrigated Farms Company or that of the San Francisco Oakland Terminal Railways. We will, however, call the Court's attention to the action of the Commission, as shown by the order of December 30, 1913 (Trans. pp. 83-89), in authorizing the construction of a portion of the main line of the Sacramento Valley Electric Railroad running north from a junction with the Oakland, Antioch and Eastern Railroad to the town of Dixon, a distance of 12½ miles at an esti-

mated cost of $265,000. The several orders of the Railroad Commission show that the only source from which the money for the construction of this unit could have been drawn was from the proceeds derived from the sale of the preferred stock (see also Trans. pp. 89, 90). This stock was sold upon the express guaranty of the Commission that construction would not be entered into until there should be "in the hands of the company from the sale of stock $750,000." It seems to us that counsel in perfect candor should also go outside the record and state to this Court that Yolo County farmers are defending suits upon notes, in an approximate amount of $150,000, given the company on account of stock subscription made upon the faith of this guaranty: that this unit has been built and is being operated by the Oakland, Antioch and Eastern Railroad Company under an agreement between the company, its creditors among whom the operating company is one of the largest, with the knowledge of, *but without any formal approval* of a lease, *as required by law,* by the Railroad Commission.

We have great faith that upon the authorities that we have presented here, the Court will find no merit in a defense that seeks to violate common canons of good faith and honest dealing between men solely upon the theory that the Railroad Commission of California is so all-powerful that it can do no wrong.

We respectfully submit that the judgment of the trial Court should be affirmed.

Dated, San Francisco,
March 15, 1916.

JACOB M. BLAKE,
Attorney for Defendant in Error